

# The Right of the Defendant to Refuse an Insanity Plea

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## I. Introduction

From the time of Edward III the Anglo-American legal tradition has not held the person who is mentally disabled liable for his criminal acts.<sup>1</sup> The plea of "Not Guilty by Reason of Insanity"<sup>2</sup> has been developed as a protection for this individual.<sup>3</sup> We are here raising the questions, is the insanity plea in truth a protection for the defendant? If the competent defendant does not wish a NGRI plea, can it nevertheless be forced upon him? Is such an enforced plea perhaps a violation of his constitutional rights? Who, if not the defendant, has the right/duty to enter an NGRI plea, and is this duty well defined?

## II. The Plea—Not Guilty by Reasons of Insanity

Historically, under our system of jurisprudence, the prosecution must prove two elements before a defendant can be found guilty of a crime and held liable to society for his acts.<sup>4</sup> He must have committed the illegal act and he must have intended to do so. He must have had the guilty mind, the requisite *mens rea* at the time of the commission of that act before he can be considered morally responsible. Roscoe Pound has written: "Our substantive criminal law . . . postulates a free agent confronted with a choice between doing right and doing wrong, and choosing freely to do wrong."<sup>5</sup> Our collective conscience does not allow punishment where it cannot impose blame.<sup>6</sup> One found to have been insane at the time the criminal act was committed was not capable of having the necessary *mens rea*. In the eyes of the law he is blameless,<sup>7</sup> he is NGRI, legally he is innocent.

## III. The Questionable Privilege

Society has sought to protect the defendant who was insane at the time of the commission of an otherwise criminal act. He is not sent to prison, but is usually committed to a mental hospital for an indeterminate stay, where for his own benefit and the benefit of society, he is treated and if possible cured. Experience indicates, however, that the offender who is sent to prison often spends less time deprived of his freedom than does the defendant who is found NGRI and is sent to a mental institution.

Once committed to a mental institution, the NGRI defendant (committee) has in the past been faced with a greater burden to establish that he is no longer in need of hospitalization than has the individual who has been civilly committed.

Maryland, for example, follows the modern trend of establishing a mandatory period of hospitalization for the NGRI, at the end of which he may petition for release.<sup>8</sup> The applicable statute provides for institutionalization for ninety days; then the committee may request a hearing to determine if he is presently dangerous to himself or others as a result of his mental disease.

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Judge Harris of the Baltimore City Circuit Court, on February 16, 1976, ruled that this statute was unconstitutional, basing his decision on the premise that a greater burden cannot be placed on the criminal committee than on one civilly committed. If this decision is upheld on appeal, the criminal committee will have the same right to an adversary proceeding within five days of commitment that is afforded to one hospitalized under civil proceedings.<sup>9</sup>

Even if the above ruling should be generally adopted, however, the criminal committee will still face a practical burden. Gerald Cooke and Cynthia R. Sikorski<sup>10</sup> recently expressed the opinion that the individual who has been committed as a result of a NGRI finding may discover that the seriousness of the crime which he committed, rather than his present mental state, may be the determining factor in deciding if he is dangerous to others.

Furthermore, there is a stigma attached to mental illness, and although the degree of this stigma may have decreased in recent years, it is still a factor to be considered. This would be particularly true in certain segments of society where a criminal conviction or two would be forgiven, but the person who had been confined in a mental institution would be suspect. This stigma should be considered, not only from society's view, but also from the way the individual looks at himself.<sup>11</sup> He may find it acceptable to have had a "brush with the law" but not willing to consider himself "crazy."

Defendants have offered other reasons for not wanting to plead NGRI. One defendant maintained that he was innocent of the charges, that the NGRI plea carried with it an implication that he had committed the act, and that he did not wish to accept this implication.<sup>12</sup> One preferred to accept a brief period of incarceration for bad check charges rather than face the uncertainty of an indeterminate commitment to a mental hospital. Still another was familiar with both the local prison and the local mental hospital and felt that the prison offered social advantages not available in the mental institution.<sup>13</sup>

If we assume that a defendant is competent to stand trial, and that he does not wish to plead NGRI, can he refuse to do so?

#### **IV. The Right/Duty of Attorney to Enter NGRI Plea**

The American Bar Association in its Minimum Standards on the Defense Function<sup>14</sup> provides for certain decisions to be made by the accused after full consultation with counsel. Among the decisions to be made by the defendant is what plea should be entered.<sup>15</sup> An attorney who makes the decision himself is likely to be accused of unprofessional conduct. Several private attorneys, in fact, expressed the view that they would not enter a plea contrary to a client's wishes.<sup>16</sup>

Some courts have, however, distinguished the "not guilty" and "guilty" plea from the NGRI plea. The Maryland<sup>17</sup> court in *White v. State*<sup>18</sup> said that the NGRI is similar to an affirmative defense such as self-defense or coercion, and like any defense, the question of an insanity defense remains a matter of trial strategy *to be determined by counsel* (emphasis supplied) after consultation with his client.

In *Brookhart v. Janis*,<sup>19</sup> in a concurring opinion, Justice Harlan stated, "I believe a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval." Harlan went on to say, however, that the lawyer could not surrender a constitutional right of the client.

Following the rationale of the previous case, Judge Close allowed counsel to enter an NGRI plea contrary to a client's wishes in *List v. State*.<sup>20</sup> In so allowing, the judge also said that since the insanity plea was a matter of trial strategy, the decision to enter an NGRI plea could be made by counsel irrespective of the lack of appellant's consent and over her express objections.

Furthermore, the judge said that the appellant's objections to the NGRI plea were

without legal significance. Insanity at the time of the offense was a question that must be decided by medical diagnosis and must therefore be made by medically trained psychiatrists. As a lay person the appellant was incompetent to form or express an opinion.<sup>21</sup>

The attorney in the List case advised his client on several occasions that it was his duty to file a plea of NGRI whether she liked it or not.

In *Clark v. United States*<sup>22</sup> the defendant had originally pleaded guilty, but later testified that he must have been insane when he committed the criminal act. Counsel had not, however, raised the insanity defense on his own. The court reversed the conviction, upholding the defendant's contention that he had been deprived of effective counsel because his attorney had failed to plead the insanity defense. The court went on to say that counsel could not concede his client's sanity.

In *Plummer v. United States*<sup>23</sup> the court held that counsel had the duty to raise the insanity defense in an appropriate case, and failure to do so amounted to incompetency of counsel. This case involved a schizophrenic who had raped an eleven-month-old child. Because of the facts of this case, it was incumbent upon the attorney that he at least explore the possibility of entering an NGRI plea.

In an article in the *American Criminal Law Journal*,<sup>24</sup> the authors speak of the ethical quicksand, the conflict between the view which holds that the client is to decide what plea should be made, and the other view which would demand that counsel fulfill his duty by entering an NGRI plea himself, if he should sense that his client was suffering from mental illness when he committed the illegal act. In fact, the defense attorney's role has never been clearly defined; is he an advocate for his client's desires or is he the legal guardian of his client's interests?

The practicing attorney faces a dilemma; if he forces a plea on a defendant, he can be considered guilty of unprofessionalism. Should he on the other hand fail to enter a NGRI plea, he may be open to charges of incompetency of counsel and even liable for malpractice.<sup>25</sup>

## V. The Right/Duty of Court to Inject NGRI

In 1895 the Supreme Court of the United States expounded what has become known as the Davis rule.<sup>26</sup> The essence of this rule is that insanity is not strictly an affirmative defense and can be raised by either the court or the prosecution. This idea is the basis for allowing the court to step in and override the wishes of the defendant when the defendant does not want to enter an NGRI plea. In spite of the Davis rule, however, courts have only reluctantly injected the insanity issue into a trial when it was contrary to the defendant's expressed desire.

In *Whalen v. United States*,<sup>27</sup> a prosecution for robbery and attempt to commit rape, one of the issues involved was whether there was sufficient evidence in the record pertaining to appellant's lack of sanity to raise the issue of insanity, even though the appellant himself refused, and whether the trial judge erred by not raising the insanity issue *sua sponte*. The court in very strong language stated that a defendant may refuse to raise the insanity issue, but he may not, in a proper case, prevent the court from injecting it.

The court went on to say that the legal definition of insanity in a criminal case is a codification of the moral judgment of society as respects a man's criminal responsibility; if a man is insane in the eyes of the law, he is blameless in the eyes of society and is not subject to punishment in the criminal courts. The judge *must* forestall the conviction of one who in the eyes of the law is not mentally responsible for his otherwise criminal acts.

Subsequent cases have followed the ruling in the Whalen case, holding that because of society's interest in rehabilitating the accused, and because of the court's responsibility

in seeing that justice is done, the trial court has the duty to see that an NGRI plea is entered in an appropriate case. On those occasions when this decision must be made over the defendant's objections, the decision is especially delicate.

## VI. The Right of the Defendant to Plead

At common law, the accused was required to plead in person, and statutes in some states still make this mandatory.<sup>28</sup> Many states, however, make a distinction and say that a plea of guilty must be made by the defendant, but a plea of not guilty may be made by the attorney.<sup>29</sup> Theoretically, in the latter instance, the accused cannot be injured thereby. The Supreme Court of the United States has ruled that due process of law requires that the accused plead, or that he be ordered to plead, or, in a proper case, that a plea of "not guilty" be filed for him.<sup>30</sup>

Convictions are invalid where a guilty plea is entered by the accused's attorney and the record reveals that the defendant did not authorize such a plea.

In *People v. Rogers*,<sup>31</sup> the Supreme Court of California held that the defendant was deprived of due process of law where a judgment of conviction was entered following a stipulation by the accused's counsel. Since the result of this stipulation was a guilty finding by the court, it was found that counsel had, by making such an agreement, in effect withdrawn the defendant's not guilty plea without the defendant's express authorization. Neither the court nor counsel can force the defendant to plead guilty, and any tactic which *would have such an effect* (emphasis supplied) would be in violation of the constitutional rights of the defendant.

The defendant in *White v. State*<sup>32</sup> claimed that the withdrawal of the insanity plea by trial counsel was such a tactic and therefore was a waiver of his constitutional right, that it was in fact analogous to a voluntary plea of guilty. Here the defendant had initially entered an NGRI plea, but it was withdrawn by counsel and a not guilty plea entered in its place. The contention of the defendant was that the plea of NGRI carried with it an implication that he had committed the illegal act but that he was not legally responsible for it because of insanity. Although the plea was changed to not guilty, the implication would remain that he had in fact committed the criminal act, thus depriving him of a fair trial. The court, however, rejected this argument, stating that the accused had forfeited no right when the plea was changed. The right against self-incrimination, the right to a jury trial and the right to confront witnesses still remained. Furthermore the state still had to prove its case, and the insanity plea was no more than an affirmative defense and remained a matter of trial strategy.

In the California case of *People v. Hickman*,<sup>33</sup> the defendant also claimed that he had been denied due process when he pleaded NGRI and was not allowed to plead not guilty as well. The decision of the court in this case also was that the defendant had been deprived of no constitutional right, since the state still had to prove its case.

Samuel Brakel and Ronald Rock, in their study entitled "Mental Disability and the Criminal Law,"<sup>34</sup> stated that as a practical matter, raising the issue of insanity is tantamount to an admission by the defendant that he committed the alleged act, and that an unsuccessful defense of insanity significantly increases the likelihood of conviction.

Some states have recognized the merit of the argument that a plea of NGRI carries with it an admission of guilt as to the commission of the act. In an attempt to eliminate this implication, they have provided by statute for a bifurcated trial, one trial on the issue of the accused's insanity and the other on the merits of the case. The typical bifurcation statute provides for a conclusive presumption of sanity during the initial determination. If the accused is found guilty at this trial, then at the subsequent trial the question of the defendant's sanity is tried, often before the same jury.<sup>35</sup> Some state statutes provide for the reverse procedure—the insanity trial is held prior to determination on the merits of the case.<sup>36</sup>

The bifurcated trial would seem to offer the accused a protection, but such trials have been questioned on the basis of their constitutionality for nearly a century.<sup>37</sup> *Bennett v. State*, 1883, one of the earliest cases ruling on the constitutionality of the bifurcated trial, upheld the fairness of the procedure.<sup>38</sup>

On the other side, it is argued that since intent is an essential element of a crime, a defendant cannot be found guilty under an absolute presumption of sanity, when in fact the defendant may not be sane. In such a trial the state does not prove that the defense has the requisite *mens rea*, which is necessary to the determination of guilt.<sup>39</sup> The Supreme Court of Arizona repealed as unconstitutional the bifurcated trial because of the exclusion of mental condition at the first trial, as a defense to the charge of intent. So far, Arizona has been the only state to do so.<sup>40</sup>

Texas instituted a preliminary insanity trial but has abandoned it as being too cumbersome and costly.<sup>41</sup> Louisiana has also given up the procedure for like reasons.

Maryland does not provide for a separate trial on the issue of alleged insanity at the time of the commission of an offense. But when an insanity plea has been filed, if the court finds proof sufficient to surmount threshold problems as to the accused's lack of responsibility, then the state has the burden of convincing the trier of fact that the accused was sane.<sup>42</sup>

As we have seen in the previous discussion, the defendant generally has the right to enter the plea that he feels is most advantageous, but this is not an unqualified right, especially when the guilty plea is involved. The Supreme Court of the United States in its decision in the *Alford*<sup>43</sup> case has, however, put this principle in question.

The defendant in the *Alford* case had an extensive previous criminal record, and there was substantial evidence that he had committed the murder with which he was presently charged. Under North Carolina law, had he been convicted of the murder, he would have been subject to a possible death penalty, and the defendant felt that under the circumstances, he would get it. As a result of plea negotiations he agreed to plead guilty to second degree murder, which carried a maximum penalty of thirty years imprisonment. However, he never admitted that he had committed the offense, and at the time of pleading he pleaded guilty but said that he was not guilty, he had not committed the murder. He voluntarily forewent a plea of innocent for tactical reasons, and the Supreme Court of the United States in a six-three decision sanctioned this maneuver.

The court said that they could perceive no material difference between a plea which refuses to admit commission of the criminal act and a plea containing a protestation of innocence, when, as in this case, a defendant intelligently concludes that his *interests* (emphasis supplied) require an entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

The court cited in its opinion a statement from a century-old Iowa case<sup>44</sup> which in dictum said that reasons other than the fact that he is guilty may induce a defendant to so plead . . . and he must be permitted to judge for himself in this respect.

*Alford*, in other words, says that the standard is not whether the defendant committed the illegal act and had the necessary *mens rea*, but rather "basically the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."<sup>45</sup>

Although the court made it clear that their decision did not mean that a judge must accept all guilty pleas, just because the defendant so desired to plead, can we not argue that an individual has the right to plead guilty or not guilty, rather than have an NGRI plea thrust upon him? If psychiatric evidence establishes that the defendant is not only competent to stand trial but also competent to plead, if the defendant understands the situation and decides it is to his tactical advantage to enter a certain plea, shouldn't he have the right to make this decision for himself?

The court in *Alford* suggested that at least there would be no constitutional bar to a defendant's pleading guilty or not guilty, even though he was insane at the time he

committed the criminal act. In referring specifically to *Overholser v. Lynch*,<sup>46</sup> the court expressly refused to rule that Lynch had an absolute right to have his guilty plea accepted, but implied that there would have been no constitutional error had his plea been accepted, even though the judge indicated that there was a valid defense.

The Maryland case *English v. State*<sup>47</sup> accepted the *Alford* doctrine and said that an admission of guilt is not a constitutional requisite to imposition of criminal penalty resulting from a plea of guilty.

Again, in *Williams v. State*,<sup>48</sup> the Maryland court, in referring to the *Alford*<sup>49</sup> case, adopted the standard set forth in that case, that a guilty plea may be accepted effectively where the record shows that it was made voluntarily, and with intelligent understanding of the possible consequences of the plea, even though the defendant denies guilt, provided the state presents a strong factual basis for the charge.

The above holdings give significant support to the defendant's contention that he does have the right to have the insanity issue kept out of a trial, when and if he feels it is to his advantage to do so.

### VIII. Opinions and Conclusions

The law at the present time is fairly clear: the defendant does not have the right to refuse the insanity defense. Under the proper circumstances, his attorney can inject the defense against the defendant's wishes, as can the court or the prosecution. In fact several jurisdictions have ruled that the lawyer, the court and the prosecution have the duty to raise the issue of the accused's mental condition, when there is evidence that the defendant was insane at the time of the commission of the alleged act.

This stance of the law presents ethical problems for the attorney who has been raised in the tradition that the attorney should advise and inform, but the client should make the decision as to how to plead.

The ethical considerations are also seriously complicated as theory and reality come into conflict. The attorney, who is so instrumental in deciding what plea should be entered, would be less reluctant to encourage or force an NGRI plea on his client if we had the hypothetically ideal mental health system. If counsel believed that his client would receive the treatment he needed, and could then perhaps return to a productive life, his decision could be reached far more easily.

The scope of this paper is not the adequacy of our mental institutions, but when the question of right to treatment as discussed in *Wyatt v. Stickney*<sup>50</sup> has become the issue it has today, we can hardly assume that the defendant who is found NGRI and sent to a mental hospital is inevitably better off than one who is sent to prison.

Interviews with attorneys in Baltimore, Maryland, made clear their uncertainty when they were confronted with the problem of deciding what plea would be in the client's best interest. An adequate treatment program would make this decision much easier.

In this period of developing civil rights for the mentally ill, there still arises the question of whether society should force the insanity plea on a defendant. The *Alford* doctrine is certain to be raised in the future in such cases, with defendants and their attorneys claiming the right to decide what is in the client's best interest.

Judge Brandeis once said that it is necessary for us to be most on our guard to protect liberty when a government's purposes are beneficent.<sup>51</sup>

### Footnotes

1. Briggs J: *The Guilty Mind*. New York, Harcourt, Brace, 1955, p 83
2. Hereinafter referred to as NGRI
3. *Commonwealth v Ragone*, 317 Pa 113, 176 A 2d 454
4. *State v Shaw*, 718 Ariz 103, 471 P 2d 715, 718 (1970)
5. Introduction to Sayre F: *Cases on Criminal Law*. 1927

6. *Holloway v United States*, 80 US App DC 3, 148 F 2d 665 (1945)
7. *Overholser v Lynch*, 288 F 2d 388, rev'd on other grounds, 369 US 705 (1962)
8. See Maryland Code, Art 59 Sec 27 (1972)
9. *Sykes v Dept of Mental Hygiene*, Superior Court of Baltimore City, Harris, J, Jan 8, 1976
10. *Cooke G and Sikorski CR: Factors affecting length of hospitalization in persons adjudicated not guilty by reason of insanity*. Bulletin of the American Academy of Psychiatry and the Law, II. 4 (1974) . p 251
11. See *Ennis B: Civil liberties and mental illness*. 7 Crim L Bull 101, 123 (1971)
12. *People v Merkouris*, 46 Cal 2d 540, 297 P 2d 999 (1956)
13. This was a case involving a homosexual, reported by Dr. Jonas R. Rappeport in a class lecture.
14. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971). Herein cited as ABA: Defense
15. See ABA: Defense Sec 5.2 (a)
16. Private interviews with John Mudd, Roger Clapp, and Douglas Sherritz in December, 1974
17. See Maryland Code, Art 59 Sec 25 (b) (1970) . "When it is desired to interpose the defense of insanity on behalf of one charged with the commission of a crime, the defendant or his counsel shall . . . file a plea."
18. *White v State*, 17 Md App 58, 299 A 2d 873 (1973)
19. *Brookhart v Janis*, 384 US 1 (concurring opinion) at 384 US 8 (1965)
20. *List v State*, 18 Md App 578, 308 A 2d 458 (1973)
21. *supra n 26*, accord *Greenleaf v State*, 7 Md App 575, 256 A 2d 552 (1969)
22. *Clark v United States*, 104 US App DC 27, 259 F 2d 184 (1958)
23. *Plummer v United States*, 260 F 2d 729 (1958)
24. *Chernoff P and Schaffer W: Defending the mentally ill: ethical quicksand*. Am Crim Law J 10:505 (1972)
25. In private interviews in Dec. 1974, Fred Green, Esq., said that he would definitely force an NGRI on a client, out of fear of malpractice. Claude L. Callegary, Esq., said that he would not hesitate to force the plea under the proper circumstances.
26. *Davis v United States*, 160 US 469 (1895)
27. *Whalen v United States*, 120 US App DC 331, 346 F 2d 812 (1965)
28. *Johnson v Commonwealth*. 72 SW 2d 472 (1934)
29. *People v Bowman*, 81 Cal 566, 22 P 917 (1889)
30. *Crain v United States*, 162 US 625 (1896)
31. *People v Rogers*, 14 Cal Rptr 660, 363 P 2d 892 (1961)
32. *supra n 18*
33. *People v Hickman*, 204 Cal 470, 268 P 909 (1928)
34. American Bar Foundation Study, *The Mentally Disabled and the Law*. Eds Brakel S and Rock R. 1971
35. Note: *Due process & bifurcated trial*, 66 Nw L Rev 327 (1965)
36. See *Colorado Rev Stat Ann Sec 39-8-3* (1963)
37. See, eg, *State v Shaw*, 106 Ariz 103, 471 P 2d 715 (1970) ; *People v Wells*, 33 Cal 2d 330, 202 P 2d 53 (1949) ; *People ex rel Juhan v District Court*, 165 Colo 253, 439 P 2d 741 (1968)
38. *Bennett v State*, 57 Wis 69, 14 NW 912 (1883)
39. *State v Shaw*, 106 Ariz 103, 471 P 2d 715 (1970)
40. *supra n 59*
41. *Townsend v State*, 417 SW 2d 55, 60 (Tex Crim App 1968)
42. Maryland Code Title 59 Sec 23 et seq (1970)
43. *Alford v NC* 400 US 25 (1970)
44. 51 Iowa 578 (1879) dictum. Accord: *Griffin v US*, 132 US App DC 108, 405 F 2d 1378 (1968) ; *Bruce v US*, 126 US App DC 336, 342-343, 379 F 2d 113, 119-120 (1967)
45. *supra n 43*
46. *supra n 7*
47. *English v State*, 16 Md 439, 298 A 2d 464 (1973)
48. *Williams v State*, 10 Md App 570, 574, 271 A 2d 777, 779 (1970)
49. *supra n 43*
50. *Wyatt v Stickney*, 325 F Supp 781 (DC ALA 1971)
51. *Olmstead v United States*, 277 US 438 (1928)